lief on this under section 39(1)(g). One does not pay for extraction of timber unless one holds a licence issued under the Sabah Forest Enactment, 1968. There is no provision in the Sabah Land Ordinance concerning payment of royalty. However, respondent could not claim for relief in respect of commission they paid to the society, the licence holder.

With respect, the learned judge was wrong to interfere with the decision of the Special Commissioners as there was sufficient evidence to support their conclusion. The learned judge, in exercising appellate jurisdiction, was not supposed to alter conclusion of facts simply because he feels that on the evidence the Special Commissioners should not have arrived at the conclusion of facts they did. In *Bracegirdle* v. *Oxley*[6] Lord Goddard C.J. made these observations:—

"It is, of course, said that we are bound by the findings of fact set out in the Case by the justices, and it is perfectly true that this court does not sit as a general court of appeal against justices' decisions in the same way as quarter sessions, for instance, sit as a court of appeal against the decisions of courts of summary jurisdiction. In this court we only sit to review the justices' decisions on points of law, being bound by the facts which they find, provided always that there is evidence on which the justices can come to the conclusions of fact at which they arrive."

The House of Lords in *Edwards (H.M. Inspector of Taxes)* v. *Bairstow & Harrison*[7] accepted that the inference of "trade" or "no trade" in a particular case was a question of fact but pointed out that the question of what the statute means by "trade" is a question of law. The learned judge considered that the Special Commissioners were wrong in their conclusion of fact. The question is whether their decision was unreasonable. The learned judge cannot disturb the finding of facts by the Special Commissioners however strongly he may have felt. In *Leeming* v. *Jones (H.M. Inspector of Taxes)*[8] Rowlatt J. remitted the case to the General Commissioners for a finding whether there was or was not a concern in the nature of trade. The case came back to him and he gave judgment in favour of appellant and respondent appealed. Although Rowlatt J. disagreed with the finding of the Commissioners he did not disturb their finding. Thus, Lord Hanworth M.R. said at page 346:—

"... I think he was right, for however strongly one may feel as to the facts, the facts are for the decision of the Commissioners. It would make an inroad upon their sphere if one were to say in a case such as the present that there could only be one conclusion. The Commissioners are far better judges of these commercial transactions than the courts, and although their attention has been drawn to what happened, they have in their final Case negatived anything in the nature of an adventure or trade."

As Lord Radcliffe said in *Edward's case*[7] at page 228:—

"I see nothing more than this in anything that was said in this House in *Leeming* v. *Jones*.[8] The only thing that I would deprecate is too much abbreviation in stating the question as by asserting that it is simply a question of fact whether or not a trade exists. It is not simply a question of fact. The true clue to the understanding of the position lies, I think, in recalling that the court can allow an appeal from the Commissioners' determination only if it is shown to be erroneous in point of law."

He concluded this judgment in these words:—

"As I see it, the reason why the courts do not interfere with Commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the Commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up the Commissioners are the first tribunal to try an appeal and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the subjects that Commissioners deal with or to invite the Courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by Commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from, and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado."

However much one may disagree with the decision of the Special Commissioners one must accept their finding of facts. Where they made findings of primary facts it is not open to the High Court to challenge their accuracy. As Raja Azlan Shah F.J. in *U.H.G.* v. *Director-General of Inland Revenue*[9] rightly pointed out:—

"But where there is evidence to consider, the decision of the Special Commissioners is final, even though the court might not, on the materials, have come to the same conclusion. In treating the question I can desire no more apt exposition of the law than what is contained in Lord Atkinson's speech in *Great Western Railway Co.* v. *Bater*[10]:—

'Their (Commissioner's) determination of questions of pure fact are not to be disturbed, any more than are the findings of a jury, unless it should appear that there was no evidence before them upon which they, as reasonable men, could come to the conclusion to which they have come; and this, even though the Court of Review would on the evidence have come to a conclusion entirely different from theirs'."

For reasons given, I do not think it can be said that on the evidence the Special Commissioners have come to a wrong decision in law. Accordingly, I would allow the appeal of the appellant with costs and dismiss the appeal of the respondent with costs. Deposit to respondent on account of taxed costs.

Ong Hock Sim F.J. and **Charles Ho J.** concurred.

Appeal allowed.

Solicitors: *Jayasuriya, Kah & Co.*

NYAP KUI FAH v. LEN ON CONTRACTOR

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim F.J. and Charles Ho J.) (October 3 and December 29, 1977]

[Kota Kinabalu — Federal Court Civil Appeal No. 3 of 1977]

Contract — Performance of contract — Extraction of timber logs from land — Possibility of performance.

Timber — Extraction — Contract — Performance.

The appellant by an agreement in writing subcontracted to the respondents who were logging contractors, the extraction of timber logs from an area of timber land. The respondents alleged that they had completed the removal of the timber from the land and the camp supervisor of the appellants had certified that all timber from the area had been extracted and those left unextracted were in an area not accessible by tractor. In a claim by the respondents for the payments due under the agreement the appellant counterclaimed for general damages on the ground that the respondents had not totally performed the contract. The learned trial judge dismissed the counterclaim and the appellant appealed.

Held: dismissing the appeal, the learned judge was correct in dismissing the counterclaim as the respondents had performed the contract, so far as it was possible.

Case referred to:-

(1) *Dahl* v. *Nelson* (1881) 6 App. Cas. 38, 59.

FEDERAL COURT.

Adrian Lee for the appellant.

William Liew for the respondent.

Lee Hun Hoe C.J. (Borneo): This appeal is against the decision of the learned judge in dismissing a counterclaim on the ground that respondent has not breached the agreement.

By an agreement in writing dated February 14, 1974 appellant sub-contracted to respondents who were logging contractors, the extraction of timber logs from an area of timber land of approximately 717 acres situated at Wulles Dorf Forest Reserve. Under the agreement appellant was to pay respondents 60 cents per cubic foot of timber logs so extracted by respondents and such payment would be made upon delivery of the timber logs at a pre-determined site. Respondents claimed appellant was indebted to them in the sum of $11,062.36 as at April 10, 1974. Appellant denied the claim and counterclaimed for general damages to be assessed and special damages of $191,938.55. During the hearing appellant admitted respondents' claim as part performance of the contract and judgment was entered for respondents for $11,062.36. The trial proceeded on the counterclaim. Both parties agreed the only issue would be whether respondents have totally performed the contract.

For the purpose of this appeal, it is sufficient to refer to the following clauses in full:—

"4. The sub-contractor shall at its own cost and expense provide all necessary workmen, fuel and all other necessary equipments for the said work of chain-sawing and tractoring, and the accommodation of the same.

6. The sub-contractor shall be entitled to payment from the contractor for all the commercial timber so worked by the sub-contractor upon the delivery of the same at pangkalan.

9. A further sum of six cents (6 cts.) per cubic foot of timber shall be paid by the contractor to the sub-contractor for the use of the contractor's log-loader if and when shall be required by the contractor.

11. The contractor hereby covenant with the sub-contractor that they shall not sub-contract the same work to any other person or persons or company other than the sub-contractor and that this agreement shall remain in force until all the commercial timber have been extracted from the said Land."

The main term of the contract of service was chain-sawing and tractoring as stated in the preamble. Clause 2 defines the service of chain-sawing and tractoring to mean all work of felling trees, debarking, cross-cutting of logs and hauling by tractors. Under the agreement the respondents were to deliver the timber to the "pangkalan." Respondents understood this to mean a place designated as a collecting point for the timber designated as a collecting point for the timber. But, appellant said it meant the dumping point on a river bank. The preamble also states that appellant sub-contracted to respondents only a "portion of the work" namely, chain-sawing and tractoring. The loading of timber from the collecting point to the river bank was the responsibility of appellant. That seems to be the reason for inclusion of clause 9. To ascertain the intention of the parties the learned judge examined the agreement closely. He also referred to a letter dated May 21, 1974 which indicates in no uncertain terms that the responsibility of transporting the timber to the river bank is on appellant. Therefore, with respect, the learned judge rightly rejected the contention of appellant. There is no appeal against his finding on this point.

Appellant maintained that clause 9 is a vital term of the agreement. Without a log-loader he would not be in a position to transport the timber to the river bank. The learned judge did not consider clause 9 to be a term as it was foreign to the agreement. If it is a term it is ancillary to the main term. Once respondents had performed their "portion of work" clause 9 ceased to have any effect. This applies to clause 4 also. The respondents would be entitled to discharge his workmen and withdraw his equipment and so forth. The offer to appellant to make use of the log-loader "if and when required" cannot be of indefinite duration. The agreement must be looked at as a whole. At most, the offer lasts until the duration of the main term of the contract. This was conceded by appellant in his submission. He is entitled to take the view that clause 9 is not a term of the contract which concerns chain-sawing and tractoring "a portion of the work." It was an arrangement of convenience to enable appellant to have the log-loader when he required it during the duration of the contract. In this sense it is foreign and does not form a term of the contract. With respect, I agree with the learned judge that respondents had not breached clause 9 in the circumstances.

Where no time is set for the performance of the contract the law implies that performance must be completed within a reasonable time having regard to the circumstances. For the purpose of deciding the agreed issue relating to the total performance of the contract the learned judge fixed the middle of May 1974 as the relevant date. It was not in dispute that respondents had extracted all the commercial timber except for certain inaccessible rocky area. The extent of this inaccessible area is immaterial. However, the contention of appellant is that under clause 11 respondents must extract all commercial timber and they could not absolve themselves merely because the area was inaccessible by tractors. Mere hardship or inconvenience or extra cost does not excuse respondents from their contract. First, it should be observed that the contract envisages the use of tractors for hauling. Secondly, the appellant's camp supervisor (PW2) who was authorised by appellant to act on his behalf was aware of the inaccessible nature of the area and had allowed respondents to stop work.

By a letter dated May 21, 1974 appellant drew respondents' attention to the agreement alleging that respondents had not fulfilled their obligation under the contract and that they had removed their equipment, particularly the log-loader without notice. He pointed out that respondents were bound by the agreement and requested respondents "to come back to the said camp and complete the last portion of road-making as well as that of the works of hauling and loading timber logs in order to enable me to transport them into the dumping point." This letter, as I have mentioned earlier, shows conclusively that appellant is responsible for transporting the timber logs to the dumping point at the river bank. Respondents replied on May 29, 1974 advising appellant to consult his

camp supervisor who had certified that all timber from the area had been extracted and those left unextracted were in area not accessible by tractor. Appellant was asked to settle the final payment of $11,000. By the last paragraph respondents made this offer:—

"But, should you still insist that there is still valuable timber left there in the camp to be extracted we are quite willing to offer our camp manager to check the area with your man. And if it is found there is some more timber to be worked, then we shall continue to complete the same for you under the same terms and conditions. This suggestion is made completely without prejudice of our claim of payment and our belief that the area has been worked and completed and whatever left remaining is not accessible by us."

Appellant's camp supervisor clearly appreciated the impossibility of working in such inaccessible area. After all, he had inspected the area with respondents' camp supervisor to satisfy himself that the area was really inaccessible by tractor and impossible to work the timber. The continuance of a contract must depend upon the possibility of performance. Respondents could not be regarded as having promised to perform an impossibility. I could do no better than to quote Lord Watson in *Dahl* v. *Nelson*[1] when he said:—

"... the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and sensible men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence."

Having regard to all these the learned judge came to the conclusion that respondents had totally performed their contract and therefore were not in breach of the contract. With respect, he is right.

Another matter which the learned judge took into consideration is the drop of timber price at the relevant date. Both parties did not dispute that timber industry went into recession in 1974 on account of inflation in April or May, 1974. There was evidence that respondents would not be paid for timber which were considered of no commercial value. The learned judge was of the view that it would be reasonable for respondents to stop the extraction of timber at the relevant date since the timber had ceased to become commercial and they would not be paid for their services.

The learned judge found that respondents had extracted over 89,000 cubic feet of timber which they hauled to the collecting point on land by tractor. Out of these, 17,900 cubic feet were transported by appellant to the dumping point at the river bank. Appellant made use of three lorries for this purpose. He owned one lorry and hired the other two. Respondents were paid by appellant for the remaining 71,982 cubic feet of timber left at the collecting point (See Exhibit P1). Appellant said that he transported the timber to the river bank for respondents and that he paid respondents on the remaining logs as advance to be accounted later. The learned judge quite rightly pointed out that appellant had contradicted himself when he requested respondents to return by his letter dated May 21, 1974, referred to earlier, to complete the works "of hauling and loading of timber logs in order to enable me to transport them into the dumping point."

It seems to me the appellant has not discharged the onus on the balance of probabilities. The learned judge has the advantage of seeing and hearing the witnesses and would be in a better position to assess their credibility. On the finding of facts the appellate court would therefore be slow to intervene. I cannot say that the learned judge was wrong in dismissing the counterclaim in that the respondents had not breached the contract as they had performed it. I would dismiss the appeal with costs. Deposit to respondents on account of taxed costs.

Ong Hock Sim F.J. and **Charles Ho J.** concurred.

Appeal dismissed.

Solicitors: *Peter Kuok & Co.; William Liaw & Co.*

SABLI BIN ADIN & ORS. v. PUBLIC PROSECUTOR

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim F.J. and Charles Ho J.) (October 3 and December 29, 1977]

[Kota Kinabalu — Federal Court Criminal Appeal Nos. 6 and 8 of 1977]

Criminal Law and Procedure — Rape — Girl under 14 years of age — Evidence uncorroborated — Cautioned statements inadmissible — Failure of justice — Penal Code s. 376 — Courts of Judicature Act, 1964, s. 60(1).

Penal Code, s. 376 — Rape — Girl under 14 — Evidence uncorroborated.

This was an appeal against convictions of rape. The girl was under 14 years of age and her evidence was uncorroborated. Cautioned statements were taken from the appellants but "no trial within a trial" was held to decide on their admissibility. The learned judge ruled them admissible after written submissions on admissibility were handed in by defence counsel and the Deputy Public Prosecutor.

Held, allowing the appeal: (1) the evidence of the complainant was uncorroborated and there were serious and grave discrepancies in the evidence;

(2) the cautioned statements should not have been admitted in evidence without a "trial within a trial;"

(3) there had been a failure of justice and the proviso to section 60(1) of the Courts of Judicature Act, 1964 could not be invoked.

FEDERAL COURT.

Abdul Razak Rouse for the appellants.

Abdul Wahab Patail (Deputy Public Prosecutor) for the respondent.

Ong Hock Sim F.J. (read by Lee Hun Hoe C.J. (Borneo) delivering the judgment of the Court): The four appellants were convicted of rape under section 376 of the Penal Code. They appeal to us against both conviction and sentence. The victim was born on April 18, 1963 according to birth certificate produced as Exhibit P3 and no question of her consent to the alleged acts arises.

The only evidence as to the involvement of the appellants in the offences charged was given by her, and whether it was or was not to be expected, there were serious and grave discrepancies. The offences were alleged to have occurred on July 18 and July 19, 1976. The medical officer who examined her said that "the bruise could have been made any time *before*